United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2005

To be argued by : Thaddeus B. Hodgdon

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PAUL J. CARDAROPOLI,
Petitioner-Appellee

v.

JOHN J. NORTON, WARDEN,
FEDERAL CORRECTIONAL INSTITUTION,
DANBURY, CONNECTICUT, ET AL.,
Respondents-Appellants

LOUIS C. PISELLI,
Petitoner-Appellee

v. No. 75-2024

JOHN J. NORTON, WARDEN,
FEDERAL CORRECTIONAL INSTITUTION,
DANBURY, CONNECTICUT, ET AL.,
Respondents-Appellants

JOSEPH MAIDA,
Petitioner-Appellee

v. No. 75-2015

JOHN J. NORTON, WARDEN,
FEDERAL CORRECTIONAL INSTITUTION,
DANBURY, CONNECTICUT, ET AL.,
Respondents-Appellants

WILLIAM SILVERMAN,
Petitioner-Appellee

v No. 75-2025

JOHN J. NORTON, WARDEN,
FEDERAL CORRECTIONAL INSTITUTION,
DANBURY, CONNECTICUT, ET AL.,
Respondents-Appellants

MAURICE H. BARSKY,
Petitioner-Appellee

v No. 75-2023

JOHN J. NORTON, WARDEN,
FEDERAL CORRECTIONAL INSTITUTION,
DANBURY, CONNECTICUT, ET AL.,
Respondents-Appellants

HOWARD SILVERMAN,
Petitioner-Appellee

v. No. 75-2026

JOHN J. NORTON, WARDEN,
FEDERAL CORRECTIONAL INSTITUTION,
DANBURY, CONNECTICUT, ET AL.,
Respondents-Appellants

NICHOLAS LASORSA,
Petitioner-Appellee

v.

JOHN J. NORTON, WARDEN
FEDERAL CORRECTIONAL INSTITUTION,
DANBURY, CONNECTICUT, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLANT

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I N D E X

C I T A T I O N S

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-2005, 75-2015,
75-2023-2026, 75-2033

PAUL J. CARDAROPOLI, et al.,

Petitioners-Appellees

v.

JOHN J. NORTON, WARDEN
FEDERAL CORRECTION INSTITUTION,
DANBURY, CONNECTICUT, et al.,

Respondents-Appellants

On Appeal From The United States District Court
For The District Of Connecticut

BRIEF FOR APPELLANT

ISSUES PRESENTED

1. Whether the Bureau of Prisons can, consistent with the Due Process Clause, classify a prisoner as a special offender, for the purpose of facilitating centralized control over his transfer and community activities, without giving him prior notice and hearing.

2. If inmates classified as special offenders are entitled to any due process, whether it should be minimal due process rather than the substantial hearing procedures mandated by the district court.

STATEMENT

On March 18, 1974, petitioner Cardaropoli filed a pro se Petition for a Writ of Habeas Corpus, captioned Motion for Temporary Restraining Order and Order to Show Cause for a Preliminary Injunction in the United States District Court for the District of Connecticut. His petition claimed that Bureau of Prisons (BOP) officials at the Danbury, Connecticut Institution and at the Central Office in Washington, D. C. classified him as a "special case" [1/] without due process of law (App. 4). He alleged that the "special case" classification reduced his chances for parole, made him ineligible for institutional work-release and community treatment center programs, and severely minimized his chances for a custody change and institutional furloughs. His complaint sought an injunction removing the "special case" designation from both his institutional and central files.

The respondent, John J. Norton, Warden, filed a response in which he admitted petitioner had been classified as a "special

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1/ "Special case" and "special offender" refer to the same thing, the special offender designation being the current terminology by the Bureau of Prisons. The term is used as a classification for certain categories of prisoners who are deemed to require centralized administrative supervision by the Central Office, Correctional Program Division, Washington, D.C. See BOP Policy Statement 7900.47(App. 73).

case," and alleged that the classification was based on information in petitioner's file indicating that he had been involved in "organized crime" (App. 9). He further alleged that the information in the file consisted of a Form 792, "Report on Convicted Prisoner by United States Attorney," in which the attorney who participated in the investigation and trial of petitioner had made the following observations about him: (1) Associated with several well-known organized crime figures in western Massachusetts; (2) Owned and operated the Hideaway Lounge in Springfield Massachusetts, a known center for prostitution and drug related offenses; and (3) Was present at the so called "Little Appalachia" meeting in Worchester, Massachusetts, which was attended by every known organized crime figure from Massachusetts,and Rhode Island.

Based on this showing, respondent asked that the petition be dismissed since it was clear that the "special case" label was not arbitrary in that it had a substantial basis in fact. Moreover, respondent asserted that there were good reasons for identifying members of organized crime to institutional officials -- considerations of public protection, prison discipline, and rehabilitation -- so that such classification was a reasonable exercise of the proper discretion of the BOP.

As an additional ground for dismissal, respondent submitted petitioner had not demonstrated any harm arising out of the facts which he alleged, because petitioner was not ineligible for work-release or community treatment center, and his other claims were wholly speculative since he was not yet eligible for and therefore had not yet been denied or hindered from getting parole, a custody change or an institutional furlough. Additionally, respondent noted that with regard to consideration for parole by the Parole Board, they would also be in possession of the Form 792 and their decision would be based on the information contained therein rather than on the "special case" label.

On April 9, 1974, petitioner, by his appointed counsel, filed a reply to the government's response (App. 11). He denied that he was the owner or the operator of the Hideaway Lounge and denied respondent's characterization of it. He denied attending the "Little Appalachia" meeting in Worchester, Massachusetts or any other meeting of organized crime figures. Furthermore, he claimed that he had already been harmed by his "special case" designation because he was treated as an original jurisdiction case pursuant to 28 C.F.R. 2.17, which

resulted in his parole hearing in March 1974 being reviewed, and an initial decision made on it, by an en banc Board of Regional Directors of the Parole Board rather than the initial decision normally made by the Board examiners at the institution. Petitioner also claimed that the "special case" designation would affect his reputation and employment opportunities after release from prison. He once again asserted that the classification would either deprive him of furloughs, or delay his eligibility for them due to the requirement that his requests therefor be reviewed in the Central Office of the BOP in Washington, D. C.

Petitioner later filed a Supplementary Reply to Government's Response To Order To Show Cause, in which he alleged that he had been denied a furlough because of his "special case" designation (App. 16).

On October 17, 1974, the court below ruled that petitioner was classified as a "special case" in violation of the principles enunciated in Catalano v. U. S., 383 F.Supp. 346 (D. Conn. 1974) (App. 48),[2/] and therefore, the BOP was ordered to remove the

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2/ The Court held in Catalano that"the consequences of a 'special offender' classification are significant" (App. 55). It held that the "special offender" classification results in inordinate delays in requests for furloughs because such requests must be reviewed by the Central Office of the BOP. The court also
(footnote continued on next page)

"special case" classification from all its records and files, and the BOP was enjoined from reclassifying petitioner as a "special case" unless he had been accorded procedural due process as set forth in Catalano. Judgment was entered on October 24, 1974 (App. 18-19). Respondent filed his notice of appeal on December 19, 1974 (App. 26).

2/ (continued)
stated that the inmate has no personal contact with the decision-maker and, if his request is denied, he experiences anxiety, anger, bewilderment and, at times despondency. With regard to parole, the Court found that the classification results in all institutional parole hearings being reviewed in Washington en banc by the Board of Parole which makes an independent survey of the underlying evidence relied on by the BOP in designating an inmate a "special offender," and unless the evidence is found wanting, the "special offender" label may well affect the inmate's parole release even to the point of exceeding the appropriate length of time prescribed by the Table of Guidelines. 28 C.F.R. 2.20. The Court concluded that dire consequences flow from the classification and that an inmate has a vital interest in the decision-making process.

The Court held that furloughs, work-release, transfer to community treatment centers, and the opportunity for early paroles are cognizable benefits extended to all prisoners at the institution, and that they are of great value to the inmate. Therefore, the Court concluded that since the "special offender" classification may deprive the inmate of these benefits, he has suffered a grievous loss and is entitled to a due process hearing prior to being so classified.

The Court held that the minimum requirements of such a hearing include: (1) ten days notice prior to the hearing, with a specification of reasons for the proposed designation and a brief description of the underlying evidence sufficient to enable the inmate to marshall facts in his defense; (2) an inmate's personal appearance before the decision-maker with
(footnote continued on next page)

With the exception of petitioner Maida, the other petitioners-appellees -- Barsky, Piselli, the two Silvermans, and LaSorsa -- filed their petitions after the decision in Catalano and Cardaropoli, and they received the same relief as Cardaropoli without any response being filed by the government. Petitioner Maida filed his petition May 29, 1974, and after a response by the government, received the relief granted in Catalano. Notices of appeal were subsequently filed on behalf of the respondent in all the cases.[3/]

2/ (continued)
permission to call witnesses and present documentary evidence; (3) no opportunity for cross-examination or confrontation of adverse witness, except in the unusual situation where the decision-maker cannot rationally determine the facts; (4) no provision for counsel unless the issues are complex or the inmate appears unable to collect or present his evidence; (5) a hearing officer with no personal knowledge of the basis of the proposed classification; but he may be appointed by the warden and can be the inmate's caseworker; (6) no necessity for transcribing or recording the proceedings; (7) written findings by the hearing officer if he finds the "special offender" classification is warranted; and (8) review of a recommendation for "special offender" by the Chief of Classification and Parole at the institution, the warden, and the BOP (Central Office).

3/ The BOP has removed the "special case" designation from the files of each petitioner. This case is not moot, however, because the court's order prevents the BOP from reclassifying the petitioners as "special offenders" unless they are first given a hearing in compliance with the requirements set out in Catalano.

Following the Decision and Order in his case, petitioner Cardaropoli filed an application for Supplemental Relief which is not pertinent to our inquiry here, but which is included in the Joint Appendix along with the Government's Response and Petitioner's Reply (App. 20, 29-46). Petitioner basically complains therein that he was denied a request for a furlough without any rational basis in law and fact, and he alleges that the special offender classification, even though expunged from his file played a part in the denial.

ARGUMENT

I

Federal Prisoners Are Entitled To Procedural Due Process Only If They Are Deprived Of Benefits In Which They Have A Liberty Or Property Interest.

The court below held that petitioners were entitled to due process before being classified as special offenders because dire consequences flow from the classification, and the treatment inherent in the "special offender" process constitutes "grievous loss." The threshold difficulty in the court's analysis is its failure to consider the nature of the inmate's "grievous loss," if any, resulting from classification as a special offender. It is undisputed that the Due Process Clause applies only to deprivations of "liberty" or "property" interests. Board of Regents v. Roth, 408 U.S. 564, 569-571 (1972); Cafeteria Workers v. McElroy, 367 U.S. 886 (1961). Thus, even though the classification of petitioners as special offenders may hold certain undesirable consequences for them and may be "felt" as "grievous loss" (just as the teacher in Board of Regents, supra, and the cafeteria worker in Cafeteria Workers, supra, felt "grievous loss" from loss of employment), the Due Process

Clause does not require any procedural formalities because there was no liberty or property interest at stake in the classification. Arnett v. Kennedy, 416 U.S. 134, 164 (1974) (Justice Powell, concurring).

The Supreme Court recently applied these principles in Morrissey v. Brewer, 408 U.S. 471, 480-482 (1972), where it initially determined that revocation of parole deprives an individual "of the conditional liberty properly dependent on observance of special parole restrictions" (Id. at 480), before proceeding to the question of how much procedural due process was required. Similarly, here the Due Process Clause requires notice and a hearing prior to classification as a special offender only if the classification deprives the inmate of either "liberty" or "property" within the meaning of the Fifth Amendment. The suppressed assumption of the court below was that since the classification may constitute "grievous loss," it must have been occasioned by the deprivation of a liberty or property interest. That assumption is incorrect.

"Grievous loss" may be felt by an individual whenever he is subjectively disappointed by the inability to retain in the

future what he had possessed in the past, or to obtain what he expected to have in the future. In either case, before the Fifth Amendment will protect his interest, the individual must have a "legitimate claim of entitlement" (to retain what he had in the past, or to obtain what he expected in the future), because the Due Process Clause does not protect a "unilateral expectation," Board of Regents, supra, 408 U.S. at 577.

While the discussion of a "legitimate claim of entitlement" in Board of Regents, supra, concerns a "property" interest, it is clear, at least in the prison context, that a "liberty" interest also depends on a "legitimate claim of entitlement" to become protected. The Supreme Court made this clear in Wolff v. McDonnell, 418 U.S. 539 (1974), 42 U.S.L.W. at 5196, where it held that although a prisoner had no constitutional right to good-time credit for satisfactory behavior in prison, Nebraska had created such a right which could be forfeited only for serious misbehavior. Thus, the Court held:

> The prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated. . . .
>
> This analysis as to liberty parallels the accepted due process analysis as to property. Id.

The court below begged the question by proceeding as if such a legitimate claim of entitlement is involved in a special offender classification simply because "grievous loss" may be felt as a result of such classification.

Although the conditions which create a legitimate claim of entitlement have never been adequately defined, recent due process cases consistently require, at a minimum, the existence of some rule that, if a certain state of facts exists, the government must take specified action. In other words, some independent legal force must remove or curtail governmental discretion. See Arnett v. Kennedy, supra, 416 U.S. at 181-182 (Justice White, concurring in part and dissenting in part). Compare, Board of Regents, supra, with Perry v. Sinderman, 408 U.S. 593, 599-603 (1972). The legal force may be created by the common law (Perry v. Sinderman, supra, (implied contract); by statute (Goldberg v. Kelly, 397 U.S. 254; Arnett v. Kennedy, supra; Morrissey v. Brewer, supra; Bell v. Burson, 402 U.S. 535 (1971)); or by administrative regulation (Wolff v. McDonnell, supra, (regulation providing that loss of good time or segregation be inflicted only as punitive sanctions)). But in all of these cases officials

either were required by extrinsic rules, or had obligated themselves by regulation, to take certain specified actions only in response to a specific set of facts. Under such circumstances, the Supreme Court concluded that notice and opportunity for hearing were required by the Due Process Clause so that the affected individual could present to the responsible official his version of these controvertible facts.

This Court, as well as other courts of appeal, have recognized this principle of law. In recent cases, this Court stated that "[T]he type of interest protected by procedural due process . . . is usually one presently enjoyed" (Menechino v. Oswald, 430 F.2d 403, 408 (2nd Cir. 1970), cert. denied, 400 U.S. 1023), and that "It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom." U. S. ex rel. Bey v. Connecticut, 443 F.2d 1079, 1086 (2nd Cir. 1971), vacated as moot, 404 U.S. 879 (cited by the Supreme Court with approval in Morrissey v. Brewer, supra, 408 U.S. at 482,n.8). See also, Walker v. Oswald, 449 F.2d

481 (2nd Cir. 1971); Scarpa v. U. S. Board of Parole, 477 F.2d 278, 282 and n.17 (5th Cir. 1973) (en banc), vacated as moot, 414 U.S. 809.

However, as we next demonstrate, these conditions do not exist in the case of the prisoner classified as a special offender, and therefore a prisoner has no claim of entitlement to the status of a non-special offender.

II

An Inmate Has Neither A Liberty Nor A Property Interest In Not Being Classified As A Special Offender Because He Has No Legitimate Claim Of Entitlement To Such Status.

A. An Inmate Has No Legitimate Claim of Entitlement To Any Initial Classification.

The decision to classify a prisoner as a special offender is one of a number of initial classification decisions made when the prisoner enters the federal prison system.[4/] See 18

4/ While most categories of special offenders are classified upon entry into the prison system or shortly thereafter, there are at least three categories which could be classified after having served part of their sentence: (1) Extreme custody risks; (2) Protection cases; and (3) Inmates who had threatened high government officials while in prison. BOP Policy Statement 7900.47, 5 (3-4, 7). Such classifications stand on different ground than those involved here (organized criminal activity), and while such classifications may require notice and a hearing if they can be characterized as a form of punishment for bad behavior in prison (Wolff v. McDonnell, supra; Allen v. Nelson, 354 F.Supp. 505, (N.D. Cal. 1973), affirmed, 484 F.2d 960 (9th Cir. 1973)), those considerations are not involved here.

U.S.C. 4081, 4082, 4241; BOP Policy Statement No. 7200.11A (App. 80). Many of these decisions may be subjectively felt by him as grievous loss; for example, whether he is placed in a maximum or minimum security institution, what kind of rehabilitative program he will be placed in, and where he will serve his sentence. All of these decisions will affect his eligibility for certain benefits within the prison system. For instance, unless the inmate is placed in minimum custody, he is ordinarily not eligible for a furlough. BOP Policy Statement 7300.12C (App. 68). However, in none of these decisions is the inmate entitled to prior notice and a hearing preceding the classification given by the BOP. This is because when initially confined and classified, he has no legitimate claim of entitlement to any classification or absence of classification, or any conditions of confinement related to any classification. The initial classification decision has been placed within the discretion of the Attorney General by statute and regulation, pursuant to 18 U.S.C. §4082 and BOP Policy Statement No. 7200.11A (App. 80); only in exceptional circumstances may such a decision be subject to judicial review to determine whether it was arbitrary and capricious. See Holland

v. Ciccone, 386 F.2d 825, 827 (8th Cir. 1967), cert. denied, 390 U.S. 1045; Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951); Peek v. Ciccone, 288 F.Supp. 329, 338 (W.D. Mo. 1968).

Moreover, when the inmate enters prison the benefits of his immediate surroundings are properly taken from him as a result of the judgment convicting him of a crime and the sentence of imprisonment. What remains is not liberty -- for that has been withdrawn -- but the conditions surrounding the prisoner's lack of liberty. Thus, any benefits which he has, are those left to him by his custodian in whose hands he has been placed for the purposes of punishing him for his crime, detaining him so that he cannot harm others, and, if possible, rehabilitating him so that when he is released he will not resume the conduct that led to his incarceration. See Packer, The Limits of the Criminal Sanction, 35-70 (1968). Once he has been convicted he may lawfully be subjected to severe restraints, so long as the confinement is not cruel and unusual punishment within the prohibition of the Eighth Amendment. All of this, we submit, is a necessary concomitant of incarceration. See Wolff, supra, 42 USLW at 5195; Pell v. Procunier, 417 U.S. 817,

822-823 (1974); and Price v. Johnston, 334 U.S. 266, 285 (1948).

Thus, the initial classification decisions set the limits of the inmates liberty within the prison. Only subsequent to the classification, after the inmate has been enjoying the benefits allowed within that classification, can he have a legitimate claim of entitlement to those benefits, and then, only if those benefits are conferred upon him pursuant to statute, rules and regulations, or administrative practice of the custodian which provide that the inmate cannot be deprived of those benefits except upon the occurrence of certain facts. Wolff, supra, 42 U.S.L.W. at 5196; Board of Regents, supra, 408 U.S. at 577. Stated very simply by the Fifth Circuit in Scarpa v. United States Board of Parole, supra, 477 F.2d at 282:

> [O]nce a cognizable benefit is conferred or received, governmental action must not be employed to deprive or infringe upon that right without some form of prior hearing. We are unaware, however, of any authority for the proposition that the full panoply of due process protections attaches every time the government takes some action which confers a new status on the individual or denies a request for a different status.

The petitioners were, upon their entrance into the prison, classified as special offenders. At that time they had no legitimate claim of entitlement to any community activities programs, work release, or other benefits because their conviction and imprisonment removed any such claims. Any of these benefits which they might acquire would necessarily be limited by the conditions of the special offender classification. Hence, petitioners' alleged grievous loss caused by the conditions of the classification -- delay or preclusion of furloughs, transfers, and work releases, and review of parole applications by the en banc Board of Parole -- are not protected liberty or property interests since petitioners have never had any legitimate claim of entitlement to those benefits.

This Court's decision in Newkirk v. Butler, 499 F.2d 1214 (2nd Cir. 1974), cert. granted, 95 S.Ct. 172 (October 21, 1974),[5/] is distinguishable from the instant case and does not support the holding of the court below. In Newkirk, the Court held that

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5/ The United States has filed an amicus curiae brief in the Supreme Court, in which it contests the holding in Newkirk, supra, that the Due Process Clause always requires notice and opportunity for a hearing before a prisoner may be transferred from one place of incarceration to another.

the prisoner had suffered a substantial loss as a result of a transfer because it deprived him of living conditions, a job, and training opportunities which he had acquired over a six year period and was apparently eager to retain. The Court refused to base the right to notice and a hearing on whether the prison administration called the transfer "administrative" or "disciplinary."[6/] In the instant case, no claim has been, or could be, made that the special offender classification is disciplinary. Being an initial classification, no inmate behavior could have occurred for which the prison authorities could discipline the inmate. And, as recognized by the court below, the purpose of the special offender classification is to facilitate prison administration (App. 60-61).

The more important distinguishing fact, however, is that here, in contrast to Newkirk, the prisoners had never acquired

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6/ A subsequent panel of this Court in United States ex rel. Haynes v. Montanye, 505 F.2d 977, 980 (2nd Cir. 1974), cert. pending, No. 74-520, indicated, however, that truly administrative transfers for reasons extrinsic to the inmate's behavior, although burdensome to the prisoner, would not require prior notice and a hearing. This indication is consistent with the Court's statement in Newkirk, supra, 499 F.2d at 1218, that: "Since his right to minimum due process is clear in the circumstances of this case, it becomes unnecessary for us to decide whether some form of due process is required in the case of every transfer of a prisoner."

any interest in the things they claimed to be deprived of by the classification. Being initially classified as special offenders, the alleged right to furloughs, halfway houses, and transfers etc., without delays or preclusion from such programs, was not among the small set of minor amenities left to them by their limited liberty within the prison. Since they never had these liberties to begin with, there could be no marked change of status to foreclose them. Compare, Palmigiano v. Baxter, 487 F.2d 1280, 1284 (1st Cir. 1973). Clearly, this Court's decision in Newkirk does not control the situation in the instant case.

B. The Inmate Has No Legitimate Claim Of Entitlement To Those Things Which, According To The District Court, He Was Deprived Of As A Consequence Of The Classification.

No prisoner, whether special offender or not, has any legitimate claim of entitlement to be granted furloughs or halfway house treatment. Congress provided the Attorney General with full discretion to grant or deny furloughs. 18 U.S.C. §4082(c). The BOP Policy Statement governing furloughs specifically provides that, "Since a furlough is a privilege and not a right, it may not be granted automatically as a reward for

good behavior." BOP Policy Statement 7300.12C, 4b. (App. 66). Moreover, the purposes for which a furlough may be granted are limited, as set out in the policy statement. Id. at 5b. (App. 67-68). Since there is no statutory, regulatory, or constitutional right to furloughs, the exercise of discretion by the appropriate penal official to deny furlough is subject to review only to determine whether the decision was arbitrary and capricious. Brooks v. Dunn, 376 F. Supp. 976 (W.D. Va. 1974); Mercer v. U. S. Medical Center for Federal Prisoners, 312 F. Supp. 1077 (D. Mo. 1970).

In any event, it is not the classification itself which causes the requests for participation in community activities to be denied. The classification merely enables the BOP to control the transfer and community activities of those inmates who pose special management problems. This is accomplished by requiring prior approval from the Central Office of the BOP for a special offender's transfer or participation in community activities.[7/] The classification acts as a "flag" to

7/ Requiring prior approval for participation in such activities is not tantamount to denial of such requests. Many are, in fact, granted, but due to the characteristics of certain special offenders, including those identified with large scale organized criminal activity, they are often not appropriate candidates for participation in community activities, and this fact is recognized in BOP Policy Statement 7300.12C(5)(c)(2) which states that
(footnote continued on next page)

assure that pertinent inmate characteristics are not overlooked. If the inmate's request for a transfer or community activities is denied, these characteristics are the cause of denial and not simply the classification. It cannot be seriously argued that the mere presence of the "flag," ensuring consideration of those characteristics, constitutes the denial of a benefit to which inmates are legitimately entitled.

Petitioners claim to be entitled to prior notice and a hearing before being classified as special offenders because the classification might result in the denial of a furlough or halfway house. But, since prisoners not classified as special offenders have no right to a furlough or halfway house etc., nor do they have a right to a hearing before being denied such treatment, special offenders do not have a valid grievance because they were not granted a hearing prior to receiving a classification which might play a part in the denial of such treatment. Put differently, if no hearing is required on

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7/ (continued)
ordinarily requests for furlough by such offenders will not be granted (App. 69). Clearly, inmates identified with large scale organized criminal activity should not ordinarily be allowed back into their community because it might give them the opportunity to reestablish their contacts in the underworld and it erodes public confidence in the criminal justice system to see often times well-known criminal figures out on the street before their sentences are completed. However, as the Policy Statement also provides, each case must be considered on an individual basis(App.69).

the ultimate decision (to grant or deny furloughs etc.), by what trick of logic is a hearing required on establishing a "flag" on one of the factors that will enter that decision? Plainly, the effect of the special offender classification on community activity requests is minimal, and in no event does the classification deprive the inmate of any benefits to which he, or even a non-special offender, is legitimately entitled.

The Court below also found that because the special offender's request for community activities or a transfer must be processed through the Central Office of the BOP, the resulting delay and lack of personal contact with the decision-maker constituted "grievous loss" to the prisoner (App. 56). Clearly, the prisoner has no claim to a prompt decision on such a request, and in most cases, the delay is only two or three weeks.[8/] A special offender need only plan ahead for such a slight delay when making his request. The fact that a special

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8/ Although some cases in the past may have been delayed for greater periods of time for unexplained reasons, BOP personnel currently assure that the process has been streamlined and will take only two to three weeks depending on the caseload of requests.

offender has no personal contact with the decision-maker is equally lacking in serious harm to him. The special offender still has contact with his caseworker in making the request, and he receives an answer from the Central Office the same as he would from the institution. Although, as the court below noted, he may feel anxiety, anger, and bewilderment from a denial of his request by the Central Office, he may feel the same upon a denial by the institution.

These alleged grievances simply do not constitute a denial of "liberties," even within the prison system, which merit the protection of the Due Process Clause. See Board of Regents v. Roth, supra, 408 U.S. at 575.

The Court below implied that the special offender classification adversely affects chances for early parole. (App. 56-57). However, the court made a clearly erroneous conclusion of fact, and, in any event, even its own analysis of the effects of the classification on parole shows that the classification itself does not harm the inmates chances for parole. The court found that all special offender cases are automatically reviewed by the en banc Board of Parole in Washington. This conclusion

is contrary to the evidence in the Catalano case which accurately depicts the normal operation of the Board of Parole. As brought out in the testimony of Bernard R. Wrenn, Chief Hearing Examiner for the Board of Parole, none of the special offenders before the court in Catalano were reviewd by the en banc Board of Parole (Tr. 412, 431-432, 435 [9]). As Mr. Wrenn testified, the Board of Parole examiners at the institution look at the inmate's file and if it is stamped special offender, the examiners are merely alerted that there is something special about the case for BOP purposes. The examiners then look at the file material, and after they interview the inmate, they decide on the basis of Board of Parole criteria whether the case should be recommended for original jurisdiction treatment which requires en banc consideration. There are four criteria upon which such a recommendation could be based: 1) National Security. Prisoners who have committed serious crimes against the security of the nation . . .; 2) Organized Crime. Persons who the Regional

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9/ "Tr" hereinafter refers to the Transcript of the hearings conducted in the Catalano case on April 30, May 1, and May 23, 1974, which are a part of the supplement to the Record on Appeal filed with the Clerk of this Court.

Director has reason to believe may have been professional criminals or may have played a significant role in an organized criminal activity; 3) National or Unusual Interest. Prisoners who have received national or unusual attention because of the nature of the crime, arrest, trial or prisoner status, or because of the community status of the offender or his victim; 4) Long-term Sentences. Prisoners sentenced to a maximum term of forty-five years (or more) or prisoners serving life sentences. 28 C.F.R. 2.17[10/] If the hearing examiners determine from their own examination of the file and their interview that the inmate should be given original jurisdiction treatment, they write up a report indicating that the case is a possible original jurisdiction case based on one of the four criteria, and they send it to the Washington office, along with an alternative recommendation on the application for parole in the event that the case is not found to be an original jurisdiction

10/ These regulations were in effect at the time of the decision in Catalano and had been in effect since June 5, 1974. They were recently amended in January 1975, the only substantial changes being the deletion of category titles, the elimination of the Organized Crime category and the substitution of the following new category: Prisoners whose offense behavior (A) involved an unusual degree of sophistication or planning or (B) was part of a large scale criminal conspiracy or a continuing criminal enterprise. 40 Fed.Reg. 10975 (March 10, 1975).

case. The Washington office investigates the basis for the proposed original jurisdiction designation further and writes up a complete summary. The entire packet is then sent to the Regional Director who makes the final determination whether the case is going to be original jurisdiction and thus reviewed by the en banc Board of Parole, consisting of all the Regional Directors; otherwise, the case is sent back to the panel of examiners who render their decision on the case as in any ordinary parole determination, (Tr. 411-441).

The finding of the court below that all special offender cases are automatically reviewed en banc by the Board of Parole in Washington is clearly erroneous and contrary to the evidence summarized above. Moreover, the testimony clearly shows that the special offender classification plays no part in the determination of whether parole will be granted or denied (Tr. 413, 435-436, 441-443). The special offender classification only indicates to the parole examiners that there is something about the inmate which the BOP has decided, for reasons of its own, requires special handling (Tr. 441-442). This does not necessarily affect the treatment of the parole application

or its determination. The parole examiners make their own investigation of the file material and interview the inmate, regardless of whether the special offender classification is stamped on the file. Its presence only alerts them that there may be something in the file which could also be pertinent to their inquiry. If their investigation shows that there is something in the file pertinent to their inquiry, the case may require en banc review.[11/] If not, then they decide the parole application on the basis of their investigation and interview.

Thus, the court's conclusion that "[i]f a prisoner's "Special Offender" label has a supportable basis in fact, his parole release may well be affected even to the point of exceeding the appropriate length of time prescribed by the Table of Guidelines," is clearly erroneous. The parole examiners are not even concerned with whether the special offender label

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11/ The mere fact that a case is heard en banc cannot be considered a grievous loss. The inmate has as much of a chance to be granted parole by the en banc Board of Parole as he does by the Board of Parole examiners at the institution. The purpose of en banc consideration is to provide a larger quorum of Board members because "Increased voting quorum requirement for these cases is designed to protect the public's confidence in the integrity of Parole Board decisions by providing a broadly based consensus of Board members in cases where there is more likely to be public interest in the grant or denial of parole." 40 Fed.Reg. 5357 (Feb. 5, 1975).

has a basis in fact, because the special offender label may be there for reasons completely unrelated to parole determination -- e.g., protection case where an offender's life may be in danger if he were confined in the same facility with another prisoner, or those serving sentences for making threats against high government officials. BOP Policy Statement 7900.47, 5(3)(7), (App. 73-74). The special offender label only alerts the parole examiners that the offender is something special to the BOP, and therefore something might appear in his file which would also be significant with respect to Board of Parole criteria for parole determination. Only after investigation of the facts in the file and other facts brought out in the interview, and based on such facts, not the special offender classification, do the parole examiners make any determination on parole release. (Tr. 433-434). Thus, the offender suffers no adverse consequences with regard to parole as a result of his special offender classification.

III

If Any Process Is Due In These Circumstances, It Is Far Less Than That Required By The District Court.

We have previously shown that petitioners were not entitled to prior notice and a hearing (procedural due process) because

they had no legitimate claim of entitlement to a benefit already acquired ("liberty" or "property" interest) at the time when they were classified as special offenders. However, due process also extends substantive protection against wholly arbitrary official conduct even where procedural due process does not apply. Compare Board of Regents v. Roth, supra, 408 U.S. at 577-578 with Perry v. Sinderman, supra, 408 U.S. at 597. See also Cafeteria Workers v. McElroy, supra, 367 U.S. at 897-898; Wiemann v. Updegraff, 344 U.S. 183, 191-192 (1952); Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2nd Cir. 1968); Beatham v. Manson, 369 F.Supp. 783, 790-791 (D. Conn. 1973). Thus, the decision to classify petitioners as special offenders is subject to judicial review to determine whether the classification was arbitrary and capricious.

While we contend that no procedural due process is required to classify a prisoner as a special offender, if this Court should decide that some procedural due process is necessary, we submit that it should be far less than the district court required. As often pointed out by the Supreme Court:

> [T]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . .
>
> . . . [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. Wolff v. McDonnell, supra, 42 U.S.L.W. at 5197, citing Cafeteria Workers v. McElroy, supra, 367 U.S. at 895.

See also, Morrissey v. Brewer, supra, 408 U.S. at 471; Procunier v. Martinez, 416 U.S. 396, 418.

The very slight harm which comes to an inmate classified as a special offender has been amply demonstrated in our previous argument (supra, p. 20-29). On the other hand, the district court, itself, recognized the important function that the special offender classification plays in the prison:

> The Court accepts the government's position that the "Special Offender" designation provides an expedient and effective method to call attention to an inmate who might pose a danger to others if transferred, temporarily released or paroled. Moreover, it is obvious that the need to control the movement of prisoners within the system is an integral aspect of prison management. Organized crime figures should not be integrated with young, less

> sophisticated and impressionable prisoners, nor should they be placed in a facility which would enable them to conduct any aspect of their illegal businesses; custody and escape risks must be noted for special observation and security; premature release of 'notorious' persons may result in adverse publicity; inmates who are hostile to each other should be in different prisons; and the transfer of state prisoners must conform to the contractual obligations of the government. (App. 60-61).

The Supreme Court has also recognized the problems of burdening prison officials with due process hearings of the type required by the court below. See Wolff v. McDonnell, supra, 42 U.S.L.W. at 5197-98. Recognizing the insurmountable task which prison administrators already face with limited resources (Procunier v. Martinez, supra, 416 U.S. at 405), there should be no unnecessary increase in the hearings which they have to conduct.

Since, as we have shown, there are no liberty or property interests involved here, or if there are, they are minimal, the procedures designed to protect them should be commensurate. The district court has gone beyond those procedures required in Wolff, supra, where substantial liberty interests were involved,

by providing for counsel or counsel substitute in certain instances (Wolff, supra, 42 U.S.L.W. at 5200, only provided for aid from a fellow inmate or from the staff), by providing for cross-examination in certain instances (Wolff, supra, 42 U.S.L.W. at 5199 , indicated that the Constitution did not require cross-examination). Clearly, these procedures should not be required in the instant situation when they were not required by the Supreme Court in a case where inmates were deprived of substantial liberty rights.

We submit that the only procedures applicable here should be similar to those found necessary by the Supreme Court in the recent case of Goss v. Lopez, ____ U.S. ____, 43 U.S.L.W. 4181 (January 22, 1975) where the Court held that notice and an opportunity to present their side of the story must be given to students before they can be suspended for misbehavior. Here, we submit that when an inmate has been classified as a special offender, he should be notified of that fact and the ground upon which the classification has been made, i.e. non-federal offender, protection case, offense and prior record, etc. (BOP Policy Statement 7900.47 (App. 73)). The inmate may then seek local and appellate review of the decision through the

administrative remedy procedure recently established by the Bureau of Prisons. BOP Policy Statement 2001.6A (App. 76). Through this review an inmate is given the reasons for a particular decision in his case. This affords a documentary record for a court to determine, if the prisoner is not satisfied with the administrative determination and rationale, whether the Bureau's decision was arbitrary and capricious. The statement of reasons provided in the administrative review will permit the reviewing court to determine whether the BOP has followed its own criteria for classifying special offenders (BOP Policy Statement 7900.47), whether the criteria and the decisions thereunder are appropriate, rational and consistent, or are based upon impermissible considerations.

Knowing the reasons given in the administrative review for the classification, the prisoner can effectively contest them if they are not accurate. This procedure will develop a more complete record and will make for a meaningful judicial review of an administrative determination. See Medical Committee for Human Rights v. SEC, 432 F.2d 659, 668 (D.C. Cir. 1970), vacated as moot, 404 U.S. 403.

We submit that providing notice of special offender classication in conjunction with the administrative review procedure,

giving the inmate an explanation of the action taken and an opportunity to contest that action, amply satisfies any process which may be due in this situation. See United States ex rel. Johnson v. Chairman, N.Y. State Board of Parole, 500 F.2d 925 (2nd Cir. 1974), vacated as moot sub nom. Regan v. Johnson, ____ U.S. ____, 95 S.Ct. 488 (1974). The ready availability of the administrative review, through which the inmate has an opportunity to contest his classification of which he will have been notified, as compared to the burden and delay which would result from a hearing of the type contemplated by the court below, mandates that the former procedure be used in this situation.

CONCLUSION

For the foregoing reasons, it is urged that the district court's order requiring the BOP to give prior notice and a hearing, in compliance with its opinion in Catalano, before reclassifying petitioners as special offenders, be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief For Appellant were mailed to Pierce O'Donnell, 127 Wall Street, New Haven, Connecticut 06520, counsel for appellees Paul J. Cardaropoli, Joseph Maida, Maurice H. Barsky, Louis C. Piselli, and Nicholas LaSorsa, and to Howard Silverman and William Silverman, Federal Correctional Institution, Danbury, Connecticut 06810, on April 3, 1975.

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